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December 8, 2008

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

RE: MB Docket Nos. 07-198 and 07-42
Ex Parte Presentation

Dear Ms. Dortch:

On December 5, 2008, the undersigned of Skadden, Arps, Slate, Meagher & Flom LLP, along with DeDe Lea of Viacom, Inc. ("Viacom") and Debra Lee of Black Entertainment Television ("BET"), met with Commissioner Jonathan Adelstein and Rudy Brioche of Commissioner Adelstein's office to discuss matters relating to the above-captioned proceedings.[1]

In this proceeding, the Commission has sought comment on the status of carriage negotiations in today's "video programming market" and asked whether independent video programmers that are not affiliated with a cable operator engage

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[1] *See In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Notice of Proposed Rulemaking, MB Docket No. 07-198 (rel. Oct. 1, 2007); *In re Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, MB Docket No. 07-42 (rel. June 15, 2007). Viacom, a leading global entertainment content company, owns and operates 24 specialized music and entertainment networks targeted to consumers ranging from young children to teenagers to adults. These programming networks provide consumers a wide array of diverse, high-quality programming choices.

in "tying practices" that result in harm to cable operators and consumers.[2] Press accounts indicate that the Commission is now considering issuing an order revising the program carriage rules and a further notice of proposed rulemaking setting forth agency "findings" regarding the video programming marketplace.[3] We noted that the record in the video programming proceeding makes it abundantly clear that there is neither the authority nor need for Commission action. We also explained that no useful purpose would be served by the Commission issuing the further notice calling for additional comment (or the program carriage order), when the record evidence already is clear.

We pointed out that if the Commission were to release video programming market place "findings" – even if in the form of tentative or proposed conclusions – it could have a substantial prejudicial effect on the *Brantley, et al.* private litigation relating to the video programming industry that is currently pending in the U.S. District Court for the Central District of California. In private litigation, courts often permit administrative agency "findings" to be introduced as evidence, even if the agency's conclusions are contained in tentative rulemaking proposals (as opposed to final agency decisions).[4]

We also summarized key points contained in the Viacom submissions in this proceeding.[5] Specifically, we pointed out that the Commission has no statutory authority to regulate either independent programmers or the wholesale market for the

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2 *See id.*

3 *See, e.g., FCC Video Order Would Expand Definition of Affiliated Networks*, Communications Daily, December 2, 2008, at 3.

4 *See, e.g., Livingston v. Isuzu Motors, Ltd.*, 910 F. Supp. 1473, 1496 (D. Mont. 1995); *Resolution Trust Corp. v. Eason*, 17 F.3d 1126, 1132-33 (8th Cir. 1994); *Betts v. General Motors Corp.*, 2008 WL 2789524, 9-10 (N.D. Miss. 2008). In *Livingston*, for example, following a $2 million jury verdict in a vehicle rollover products liability case, the defendant filed post-trial motions contending that the trial court should not have admitted into evidence National Highway Transportation Safety Administration investigative reports and proposed rulemakings on rollover prevention. The court ultimately ruled that the reports and proposed rulemaking were admissible evidence, notwithstanding that they included tentative conclusions and even though they contained hearsay.

5 *See In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of Viacom Inc. (filed Jan. 4, 2008) ("*Viacom Comments*"); Reply Comments of Viacom Inc. (filed Feb. 12, 2008) ("*Viacom Reply Comments*").

sale of video programming.[6] Notably, Section 628(b) of the Communications Act, which was enacted as a part of the 1992 Cable Act to "ensure that cable operators do not favor their *affiliated* programmers over others,"[7] does not apply to non-vertically integrated programming networks, such as Viacom.[8] This provision was purposely "*limited to vertically integrated companies* because [Congress found that] the incentive to favor cable over other technologies is most evident with them."[9]

Even with regard to vertically integrated programmers, however, Section 628(c)(2)(B)(iii) of the statute expressly permits carriage agreements to contain "*different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor.*"[10] Similarly, in the context of Section 325 of the Communications Act and retransmission consent rights for broadcast signals, Congress specifically recognized that the marketplace should permit broadcasters wide latitude to pursue their right to compensation.[11] Indeed, Congress observed that "[some] broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as . . . the right to program an additional channel on a cable system."[12] It is clear that Congress intended cable operators and broadcasters to have the right to package programming in negotiations with cable operators.[13]

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6 *See Viacom Comments*, at 9-11; *Viacom Reply Comments*, at 21-23. *See also In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., at 32-38 (filed Jan. 4, 2008) ("*Fox Comments*"); Comments of NBC Universal, Inc. and NBC Telemundo License Co., at 16-30 (filed Jan. 4, 2008) ("*NBC Universal Comments*"); Comments of The Walt Disney Company, at 3-11 (filed Jan. 4, 2008) ("*Disney Comments*"); Reply Comments of Discovery Communications, LLC, at 2-7 (filed Feb. 12, 2008) ("*Discovery Reply Comments*").

7 S. Rep. No. 101-381, at 25 (1990) (emphasis added).

8 *See* 47 U.S.C. § 548(b).

9 S. Rep. No. 101-381, at 26 (emphasis added).

10 47 U.S.C. § 548(c)(2)(B)(iii) (emphasis added).

11 *See* 47 U.S.C. § 325. While Section 325 established that broadcasters should have a right to bargain for compensation, Congress declined "to dictate the outcome of the ensuing marketplace negotiations." S. Rep. No. 102-92, at 36 (1991).

12 S. Rep. No. 102-92, at 35-36.

13 The Commission also has noted that "offering retransmission consent in exchange for the carriage of other programming such as a cable channel" is "consistent with competitive marketplace

It follows that if Congress has not granted the Commission authority to regulate packaged sales and volume-based pricing by vertically integrated cable programmers and broadcasters, then certainly it did not intend for the Commission to regulate the sales practices of independent programmers. Furthermore, any attempt to regulate this market would be arbitrary and capricious and violative of programmers' constitutional rights.[14] Among other things, included with the Cablevision proposals now under consideration by the FCC is a plan to retroactively nullify numerous existing private contracts. Any such action would be an unconstitutional regulatory taking, in violation of the Fifth Amendment, because it would interfere with investment-backed expectations and have such a severe economic impact that it would result in the complete deprivation of the economically beneficial use of programmers' property (*e.g.*, rights under a contract).[15]

Most importantly, the American Cable Association ("ACA") and the National Telecommunications Cooperative Association ("NTCA") have essentially conceded that video programmers *do not* engage in "tying practices."[16] Indeed, they and the small and rural cable operators they represent have little choice but to yield before the overwhelming, unrefuted record evidence that programmers offer their video programming networks on a stand-alone basis and cannot and do not compel

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considerations." *In Re Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, ¶ 56 (2000).

[14] *See Viacom Comments*, at 31-32. *See also In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, Comments of Time Warner Inc., at 8-12 (filed Jan. 4, 2008); *Disney Comments*, at 72-83; *NBC Universal Comments*, at 30-32.

[15] *See, e.g., Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (*citing Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211 (1986)).

[16] Neither ACA nor NTCA submitted with its initial comments any credible evidence that programmers engage in tying practices. After using their reply comments merely to restate the same unsubstantiated tying allegations, both parties then effectively acknowledged that video programming is available for purchase on a stand-alone basis (though they quarrel with the price they must pay to carry high-quality content). In no event did either group even attempt to address the rigorous economic analyses submitted by Viacom and other programmers in this proceeding. *See In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, American Cable Association Reply Comments (filed Feb. 12, 2008) ("*ACA Reply Comments*"); National Telecommunications Cooperative Association Reply Comments (filed Feb. 12, 2008) ("*NTCA Reply Comments*").

cable systems to purchase unwanted programming.[17] Given that their unsubstantiated claims cannot withstand the barest of scrutiny, these small and rural cable operators have admitted their true motive in this proceeding: an unwarranted invitation for government price regulation of the wholesale video programming market.[18]

In light of the overwhelming and unrebutted record evidence confirming that the wholesale video programming market is competitive and functioning as Congress intended, small and rural cable operators have simply failed to make the case for Commission regulation or price controls.[19] They should not be rewarded for their refusal to provide programmers with a fair exchange of value (*i.e.*, carriage and distribution of a range of networks to a wide audience in return for volume discounts and other incentives), especially at the cost of harm to diverse programming and independent production.

In sum, since the beginning of 2007, more than a dozen FCC decisions have been reversed, remanded, vacated or stayed by Federal courts, or rejected by the Office of Management and Budget. The legal and factual arguments set forth above have been thoroughly laid out before the FCC. Thus, there is no need for a further notice of proposed rulemaking here, or for release of the program carriage order, and the FCC should not issue yet another decision taken contrary to law and record evidence, which inevitably will wind up overturned in the courts. For all of these reasons, Viacom urges the Commission to conclude these proceedings promptly without taking further action or wasting more corporate and government resources.

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[17] *See Viacom Comments*, at 9-11. *See also Disney Comments*, at 49-51; *Fox Comments*, at 21-26; *NBC Universal Comments*, at 34-42; *Discovery Reply Comments*, at 8.

[18] *See ACA Reply Comments*, at 27; *NTCA Reply Comments*, at 3; *Lehman Paper*, at 13-14.

[19] The small and rural MVPDs' request for intrusive government regulation is particularly ironic given their ardent belief that the Commission should *not* attempt to impose a la carte regulation on the retail market. These operators' inconsistent positions – requesting interference in the wholesale market while insisting on a hands-off policy for retail sales – merely highlights their real motive in this proceeding.

The above-referenced proceeding has been accorded permit-but-disclose status, and notice of this meeting is made pursuant to Section 1.1206(b) of the Commission's Rules.

Very truly yours,

/s/

Antoinette Cook Bush
Counsel to Viacom, Inc.

cc: Commissioner Jonathan Adelstein
Rudy Brioche